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No. _____

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Ohio's experimental school choice program provides tax-funded scholarships to low-income children who live in the Cleveland City School District. Parents of children in kindergarten through eighth grade may use the scholarships to pay tuition for those children at the private schools of their choosing, including religious schools. In light of Ohio's program, the question presented is as follows:

Whether the Establishment Clause prohibits Ohio's program from authorizing parents to use the scholarships at any private school, whether religious or not.

PARTIES TO THE PROCEEDING

Petitioners are Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the State of Ohio, the State of Ohio, and Saundra Berry, in her official capacity as the Director of the Cleveland Scholarship and Tutoring Program.

Respondents are Doris Simmons-Harris, Marla Franklin, Rev. Steven Behr, Sue Gatton, Mary Murphy, Rev. Michael DeBose, Cheryl DeBose, Glenn Altschuld and Deidra Peterson.

Intervening defendants in the proceedings below are Senel Taylor, in his own behalf and as natural guardian of his daughter, Saletta Taylor, Johnnietta McGrady, on her own behalf and as natural guardian of her children, Trinnietta McGrady and Atlas McGrady, Christine Suma, on her own behalf and as natural guardian of her children, Dominic Suma, Gloria Suma, Emeric Suma, and Emily Suma, Arkela Winston, on her own behalf and as natural guardian of her children, Tanashia Winston and Devonte Winston, Amy Hudock, on her own behalf and as natural guardian of her child, Amber Lee Angelo, Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Lutheran Memorial Association of Cleveland, and Deloris Jones.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Dr. Susan Tave Zelman, the State of Ohio, and Saundra Berry, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 234 F.3d 945 (6th Cir. 2000) (Petitioners' Appendix ("Pet. App.") at 1a-58a). The final order of the district court is reported at 72 F.Supp.2d 834 (N.D. Ohio 1999) (Pet. App. at 61a-126a). The order of the district court granting a preliminary injunction is reported at 54 F.Supp.2d 725 (N.D. Ohio 1999) (Pet. App. at 133a-65a).

JURISDICTION

The court of appeals entered judgment on December 11, 2000. (Pet. App. at 1a-58a.) The court of appeals denied a petition for rehearing on February 28, 2001. (Pet. App. at 166a.) The jurisdiction of this Court is proper under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The relevant provisions of state law, Ohio Revised Code Chapters 3313 and 3314, are reprinted in Petitioners' Appendix at 168a-98a.

STATEMENT OF THE CASE

I. The Education Crisis In Cleveland.

In the summer of 1995, Ohio's General Assembly adopted the Pilot Project Scholarship Program to address an educational crisis within the Cleveland City School District. By almost any measure—test scores, graduation rates, student discipline, judicial intervention, and financial stability—an assessment of the Cleveland schools' performance led to the same conclusion: a child's prospect for getting a decent education from Cleveland's public schools was dismal.

Earlier in 1995, the federal district court overseeing the Cleveland desegregation case had ordered the State Superintendent to assume operational and managerial control of the district. *Reed v. Rhodes*, No. 1:73CV1300, 1995 U.S. Dist. Lexis 3814 (N.D. Ohio March 3, 1995). (Petitioners have lodged copies of this unreported decision with the Clerk.) In taking this extraordinary action, the court cited the absence of fiscal, managerial, and operational controls, and the presence of a "financial crisis of magnitude." *Id.* at *6.

In March 1996, the State Auditor echoed the court's concerns in a comprehensive audit of the Cleveland district. Cleveland City School District Performance Audit (March 15, 1996), http://www.auditor.state.oh.us. The district, the State Auditor noted, was mired in a "financial crisis that is perhaps unprecedented in the history of American education." *Id.* at pp. 1-1, 2-1. The crisis had reached such proportions that it prevented the district from providing even a minimally adequate education for its students. *Id.* Indeed, at the time of the 1996 report, only 9% of the district's high school students had passed all four sections of Ohio's ninth grade proficiency test. *See id.* at p. 2-3.

In these circumstances, many parents would have withdrawn their children from the public schools. In Cleveland, however, most of the families with school-age children were economically disadvantaged. *See* 1996 Audit at p. 1-4 ("72.5%" of the district's student body "are economically and academically disadvantaged. . . ."). They simply had no choice but to accept what the Cleveland public schools offered them.

II. Creation Of The Pilot Scholarship Program.

In response to these disturbing facts, the Ohio legislature offered one immediate innovation. On June 28, 1995, it passed an experimental low-income scholarship law. *See* Ohio Revised Code ("R.C.") 3313.974-979. The Pilot Project Scholarship Program ("Program") provides two types of general relief for poverty level families in the Cleveland school district: (1) it gives scholarship awards that may be used at the qualifying school of the parents' choice; and (2) it offers to public school students money grants that may be used to pay for private tutoring. R.C. 3313.975.

A. The Scholarship Program.

Ohio's Scholarship Program establishes a pilot project for *any* school district in the State that has been the subject of a federal court order "requiring supervision and operational management of the district by the state superintendent." R.C. 3313.975(A). Cleveland is currently the only Ohio school district falling within that category.

The Program provides scholarships to children residing in the Cleveland school district in grades kindergarten through eighth grade. In determining which resident children are awarded these scholarships, the Program

requires the State Superintendent to establish eligibility criteria that "give preference to students from low income families," which the Program defines as families whose income is below 200% of the poverty line. R.C. 3313.978(A). In implementing this provision, the State Superintendent gives an absolute preference to children from low-income families: "Scholarships may be awarded to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement." Cleveland Scholarship and Tutoring Program, Administration Procedures Manual at p. 1-11 (emphasis in original) (R. 96 at 759, Court of Appeals' Appendix ("C.A. App.") at 1358). When there are more qualified low-income applicants than scholarships available, the State Superintendent conducts a lottery to award scholarships among these applicants.

The amount of the scholarship likewise depends on family income. For low-income families, the State caps a participating school's tuition at $2,500 and pays 90% of whatever tuition the school actually charges. R.C. 3313.976(A)(8); 3313.978(A). For other families, the State pays 75% of a school's tuition, up to a maximum of $1,875 (75% of $2,500). *Id.* Since the Program gives a preference to low-income families, most scholarships fall into the former category.

The Program permits the participation of all private schools, whether religious or nonreligious, so long as they are located within the boundaries of the Cleveland school district and meet the State's secular educational adequacy standards, which apply statewide. R.C. 3313.976(A)(1), (3). Eligibility to participate in no manner turns on whether a private school has a religious affiliation or includes religious teaching in its curriculum. Because scholarship recipients themselves select among the participating schools, the State

exercises no control over the extent to which these scholarships are used to attend religious rather than nonreligious private schools.

The State Superintendent provides information about the Program to all students in the Cleveland School District, and sets a deadline for the submission of applications. R.C. 3313.978(A). After a student is selected to participate in the Program, his parent applies to a participating private school. R.C. 3313.978(A)(2)(a). The school then notifies the parent as to whether the child has been admitted. R.C. 3313.978(A)(2)(b). To ensure that scholarship recipients may choose which school to attend, the Program requires participating schools to admit students in accordance with rules and procedures established by the State Superintendent. If the number of applicants exceeds the available spaces in a particular school, the school must give priority to students enrolled during the preceding year, siblings of students enrolled during the preceding year, and students from low-income families. R.C. 3313.977(A)(1)-(A)(3). The school must fill any remaining spaces by lot. R.C. 3313.977(A)(4).

No school participating in the Program may "discriminate on the basis of race, religion, or ethnic background." R.C. 3313.976(A)(4). Thus, no participating religious school may limit admission to students of its own faith. Furthermore, participating schools must "not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." R.C. 3313.976(A)(6).

Each scholarship is "payable to the parents of the student entitled to the scholarship," to be used at whichever participating school has been selected by the student's parents. R.C. 3313.979. The State mails these scholarship checks to the selected school, where the parents endorse the

checks over to the school to meet their tuition obligations. *Simmons-Harris*, 234 F.3d at 948 (Pet. App. at 4a). The Program also permits public school districts adjacent to the pilot project district to participate in the Program and "receive scholarship payments on behalf of parents." R.C. 3313.976(C).

Approximately 3,800 students enrolled in the Program during the 1999-2000 school year. Affidavit of Saundra Berry ¶ 5 (R. 96 at 733, C.A. App. at 1332). Over 60% of these children came from families with income at or below the poverty line. *Id.* at ¶10 (R. 96 at 1082, C.A. App. at 1679). The students chose among 56 participating schools, 46 of which were religiously affiliated. *Simmons-Harris*, 234 F.3d at 949 (Pet. App. at 5a).

B. The Tutoring Program.

The Program also provides tutorial assistance grants for kindergarten through eighth grade students who remain in the public schools in Cleveland. R.C. 3313.978(B). Under these provisions, parents may arrange for registered tutors to provide assistance to their children and then submit bills for those services to the Superintendent for payment. R.C. 3313.976(D). The Superintendent must offer as many tutorial assistance grants as she does scholarships. R.C. 3313.975(A). Students apply for the grants by the first day of the school year, and qualify for either 75% or 90% of the grant amount (up to $360), depending on family income. R.C. 3313.978(B), (C)(3). *See* Affidavit of Lytle Davis ¶ 4 (R. 96 at 1088, C.A. App. at 1685).

C. Early Research Findings

The Ohio General Assembly, in enacting the Program, required the State to contract with an independent

research entity to assess and evaluate the Program's operation and results. Ohio Am. Sub. H.B. 282, Section 4.34 (1999). Accordingly, the Ohio Department of Education retained researchers at Indiana University to evaluate the Program, which took effect in the 1996-97 school year. The Indiana researchers found improved test scores in language and science for scholarship students, as compared with public school students. Affidavit of Kim Metcalf ¶17 (R. 95 at 62, C.A. App. at 658). Paul E. Peterson of Harvard University conducted a similar study, concluding that scholarship students "did at least as well – and in some subjects better than – the students in the public schools." Affidavit of Paul E. Peterson at 34 (R. 95 at 281, C.A. App. at 876). Both researchers also found that parents of scholarship students are significantly more satisfied with their children's schools than parents of public school students, particularly with regard to teachers, academic standards, order and discipline, social activities, and other pupils at the school. Metcalf Aff. at ¶16 (R. 95 at 62, C.A. App. at 658). *See, also,* Peterson Aff. at 42-44 (R. 95 at 289-91, C.A. App. at 884-86) (confirming evidence of parental satisfaction).

III. The Litigation.

In January 1996, respondents challenged the Program in state court on a variety of grounds. The state trial court upheld the constitutionality of the Program, but the state court of appeals reversed. On appeal, the Ohio Supreme Court found that the Program does not violate the Establishment Clause, but held that the original enactment of the Program violated the "single subject" requirement imposed by the Ohio Constitution. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999). The Ohio General Assembly reenacted the Program on June 29, 1999.

In July 1999, respondents mounted a challenge against the revised program, this time in federal district court. In contrast to their earlier multi-pronged attack, respondents in their federal action relied solely on the Establishment Clause. Two groups of students and schools participating in the Program intervened in the Program's defense. On August 24, 1999, the District Court granted a preliminary injunction against the Program. *Simmons-Harris*, 54 F.Supp.2d at 741-42 (Pet. App. at 164a-65a). Three days later, on the State's motion, the District Court stayed its preliminary injunction insofar as it applied to students who had participated in the Program during the previous academic year. (Pet. App. at 130a-32a). The State then sought relief from the United States Court of Appeals for the Sixth Circuit to extend the stay of the preliminary injunction to encompass children new to the Program in 1999; however, that court did not rule on the motion. On November 5, 1999, this Court, by a five to four vote, granted the State's application for a full stay of the preliminary injunction. *Zelman v. Simmons-Harris*, 528 U.S. 983 (1999) (Pet. App. at 127a).

The District Court issued its final opinion and order on December 20, 1999, granting summary judgment in favor of the plaintiffs and enjoining administration of the Program in its entirety. *Simmons-Harris v. Zelman*, 72 F.Supp.2d 834, 865 (Pet. App. at 126a). The District Court stayed its own injunction pending review by the Sixth Circuit. *Id.*

On December 11, 2000, a divided panel of the Sixth Circuit affirmed the District Court's permanent injunction. The Court held that the Program violates the Establishment Clause on the grounds that it (1) has the primary effect of advancing religion, and (2) constitutes an endorsement of religion and sectarian education. *Simmons-Harris v. Zelman*, 234 F.3d 945 (Pet. App. at 1a-58a).

The Sixth Circuit determined, first, that it could not consider other educational options available to Cleveland parents, such as community schools. (Community, or "charter," schools are public schools that operate independently of any school district.) Since the Program is set forth in a separate chapter of the Ohio Revised Code and respondents had challenged only the Scholarship Program, the Court concluded that the other options available were "at best irrelevant." *Id.* at 958 (Pet. App. at 23a-24a).

The panel majority further concluded that this Court's decision in *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), controlled. The Court of Appeals reasoned that in both *Nyquist* and the Cleveland program, the majority of schools participating in the programs were religious. *Simmons-Harris*, 234 F.3d at 958 (Pet. App. at 25a). Even though the Ohio program is open to both religious and non-religious schools, the panel determined that, in fact, the Program was not neutral. Referring to "facts" not in the record, the panel found that the relatively low scholarship amount discourages non-religious schools from participating. *Id.* at 959 (Pet. App. at 25a-26a). Since the majority of students receiving scholarships attend religious schools, the court found that parents had no "meaningful public school choice." *Id.* at 960 (Pet. App. at 28a). Putting aside the feature of the Program that money flows to religious schools solely as a result of parental decisions, the Court of Appeals concluded that the Cleveland program directly funnels monetary subsidies to religious institutions. *Id.*

Judge Ryan dissented. In his view, the New York statute at issue in *Nyquist* was "totally different" from the Ohio statute in all essential respects. *Id.* at 963 (Pet. App. at 34a) (Ryan, J., dissenting). The purpose of the New York statute, Judge Ryan noted, was to benefit financially pressed

private schools, whereas the purpose of the Ohio program was to assist poverty-level students attending public schools. *Id.* at 964 (Pet. App. at 37a-38a). Unlike the New York City schools in *Nyquist*, the schools participating in Ohio's program do not receive direct financial grants and may not discriminate on the basis of religion. *Id.* at 965 (Pet. App. at 38a). Quite apart from these factual distinctions, Judge Ryan concluded that this Court's post-*Nyquist* decisions may well undermine *Nyquist*'s continuing vitality—at least as applied to a genuine private choice program such as Ohio's. *Id.* at 973 (Pet. App. at 55a-56a).

On December 22, 2000, the State filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The Court of Appeals denied the petition on February 28, 2001. (Pet. App. at 166a-67a.) On March 8, 2001, the court issued a stay of its mandate pending the filing of petitions for certiorari.

REASONS FOR GRANTING THE WRIT

I. This Case Presents An Important Federal Question.

This case presents a fundamental constitutional issue of profound importance to education policy in the United States. In 1995, the City of Cleveland faced a crisis in public education. The State of Ohio responded carefully and comprehensively to the systemic social and economic challenges presented by that crisis, relying, in part, on parental choice created through low-income scholarships. But these challenges are far from unique to Cleveland. They are, rather, part of the national debate over education reform, in general, and the vices or virtues of parental choice, in particular. This case now comes before the Court because, as this debate rages and lawmakers and parents nationwide

struggle to find answers, a cloud of constitutional uncertainty has cast its shadow on many of the most important policy questions under discussion.

In particular, there is genuine confusion over the proper meaning of this Court's Establishment Clause jurisprudence. This Court saw fit to leave unreviewed the landmark decision of the Wisconsin Supreme Court upholding, by an overwhelming margin, the constitutionality of a pioneering school choice program in Milwaukee. Nevertheless, opponents of choice have remained steadfast and unshaken. They have carried on an unrelenting nationwide battle against school choice, and they have now succeeded in the Sixth Circuit. As a result, the entire issue of the constitutionality of school choice cries out for resolution.

This case presents an ideal vehicle for addressing the important constitutional question it presents. Earlier state court litigation has resolved all state constitutional issues. The only issue remaining is whether the Cleveland Scholarship Program is consistent with the Establishment Clause. This sharply defined question arises on a fully developed record that elaborately documents the operation of the Program and the range of educational choices available to Cleveland parents.

Not only is the resolution of this issue of vital interest to the parents and children of Ohio, it is of pivotal importance to the future of education policy across the country. Virtually any lawmaker in any State knows to a near certainty that new parental choice initiatives will face immediate constitutional challenge. Lawmakers also understand the disruption that the all-too-familiar cycle of lawsuits, injunctions, and stays inevitably has on educators, parents, and children. These realizations cannot help but influence lawmakers' and educators' decisions as to parental

choice's proper place, if any, within the overall context of education reform. Public policy debates accordingly are being shunted onto constitutional sidetracks, delaying reform efforts, while the underlying legal issues await this Court's attention.

Meanwhile, parents in Ohio and elsewhere face the here-and-now problem of providing a proper education for their young children. These families, understandably, do not wish to wait several years—what may amount to an educational lifetime for a child—to learn whether traditional educational methods will work and current conditions will improve. Both Ohio's families and States across the nation need guidance that only this Court can provide.

II. The Sixth Circuit's Decision Conflicts With The Wisconsin Supreme Court's Decision In *Jackson v. Benson*.

The State of Wisconsin was the pioneer in school choice. There, as in Ohio, opponents of reform assailed a carefully crafted program that aids thousands of children in failing schools, claiming that the program violated this Court's pronouncements on the meaning of the Establishment Clause. The resulting litigation was protracted but, ultimately, the Wisconsin Supreme Court, by a 4-2 vote, sustained a Milwaukee program—a program remarkably similar to Ohio's. *Jackson v. Benson*, 578 N.W.2d 602 (Wisc. 1998). We now explain the similarities between the two programs, and then show how the two decisions squarely conflict.[1]

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[1] The Wisconsin Supreme Court's decision presents the most demonstrable conflict with the Sixth Circuit's decision because of the close similarities between the programs at issue. We note, however, the serious tensions in the burgeoning case law, as illustrated by the Ohio Supreme Court's review of the Cleveland program, the protracted litigation over Florida's school choice program, and the conflicting outcomes being reached in choice-related cases in other regions of the country. *See, e.g., Bagley v. Raymond School Dept.*, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999), and *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999) (both holding that exclusion of religious schools from Maine's education tuition program does not violate the Establishment Clause); *Campbell v. Manchester Bd. of School Comm'rs*, 641 A.2d 352 (Vt. 1994) (finding that tuition reimbursement for a religious school does not violate the Establishment Clause). These tensions reinforce the need for this Court to bring clarity to this constitutional arena.

Both the Wisconsin and Ohio programs provide scholarships to low-income elementary school students in troubled, urban school districts. Wis. Stat. 119.23(2)(a)(1); R.C. 3313.977-3313.978. Both programs make scholarship checks payable to the parents of participating students, who must endorse the checks over to the schools. *Jackson*, 578 N.W.2d at 609; *Simmons-Harris*, 234 F.3d at 948-49 (Pet. App. at 4a). In both programs, most participating schools are religiously affiliated, *see Jackson*, 578 N.W.2d at 619, n. 17; *Simmons-Harris*, 234 F.3d at 949 (Pet. App. at 5a), and there are no restrictions on the use of the available funds. *Jackson*, 578 N.W.2d at 609; *Simmons-Harris*, 234 F.3d at 949 (Pet. App. at 5a). Moreover, in analyzing the constitutionality of these two programs, both the Wisconsin Supreme Court and the Sixth Circuit applied the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and later precedents of this Court.

But despite all of these factual similarities and the common use of the *Lemon* framework, the Wisconsin court and the Sixth Circuit arrived at diametrically opposite conclusions. The Wisconsin Supreme Court upheld the Milwaukee scholarship program on the grounds that it "provide[s] public aid to both sectarian and non-sectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion, and (2) only as a result of numerous private choices of the individual parents of school-age children." *Jackson*, 578 N.W.2d at 617. The Wisconsin court concluded that this Court's *Nyquist* decision was not controlling because the program at issue in *Nyquist* directed aid "exclusively to private schools and their students." *Id.* at 614, n. 9. The Wisconsin court found that the Milwaukee program, in contrast, "provides a neutral benefit to qualifying parents of school-age children in Milwaukee Public Schools." *Id.*

The Wisconsin Supreme Court squarely rejected an argument that the program was invalid because 89 out of the 122 participating schools in Milwaukee were religiously affiliated. In that court's view, a proper constitutional analysis focuses not on the money expended by the government, but on "the nature of the benefit received by the recipient." *Id.* at 619, n. 17, citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 843 (1995). Additionally, the court took guidance from *Mueller v. Allen*, 463 U.S. 388 (1983), in finding that the percentage of participating religious schools was irrelevant to the constitutional inquiry. *Jackson v. Benson*, 578 N.W.2d at 619, n. 17, citing *Mueller*, 463 U.S. at 401.

The Sixth Circuit took an opposite analytical tack and reached a flatly contrary result. Unlike the Wisconsin court, the Sixth Circuit defined the beneficiaries of the Ohio program as the schools that participate, not the students or

their parents. In branding the Program indistinguishable from the one at issue in *Nyquist*, the Sixth Circuit stated: "[I]n both cases, the great majority of *the schools benefited by these tuition dollars* are sectarian." *Simmons-Harris*, 234 F.3d at 958 (Pet. App. at 25a). (Emphasis added.) The court further stated that the Ohio program is *not* an instance where "the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." *Id.* at 960 (Pet. App. at 27a), citing *Nyquist* at 782, n. 38. The Sixth Circuit brushed aside the fact that the Ohio program was specifically designed for the benefit of the poorest of the many poor children in the Cleveland school district. The court further disregarded the state law requirement that at least half of the children participating in the Program must be drawn from the public schools. R.C. 3313.975(B).

The Sixth Circuit's assessment of the Cleveland program's neutrality between secular and sectarian education also focuses on the nature of the participating schools, rather than on individual parents and students. Despite the fact that the Program does not restrict entry into the Program to religious schools, the Sixth Circuit found this important facial neutrality insufficient. *Simmons-Harris*, 234 F.3d at 959 (Pet. App. at 25a). The court concluded that, since most participating schools are religious and most of the participating students are enrolled at religious schools, "the program clearly has the impermissible effect of promoting sectarian schools." *Id.* at 959 (Pet. App. at 25a-27a).[2]

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[2] In part because the briefing never addressed the issue, the Sixth Circuit also seriously misconstrued Ohio law in finding a "financial disincentive" for the participation in the reform initiative of adjacent public schools—namely, the better performing suburban schools that surround Cleveland. The Sixth Circuit found (incorrectly) that such schools would receive a *total* of $2,250 for each Cleveland public school

The judicial focus on schools, not parents and children, led the court below to bypass the voluminous evidence regarding the range of educational alternatives within the Cleveland School District, including affidavits from parents of participating students who described the alternatives they considered and their reasons for selecting a particular school. (R. 96 at 1026-76, C.A. App. at 1624-73.) The Sixth Circuit instead relied upon a law review article and concluded that the relatively low scholarship amount discouraged the participation of non-religious schools. *See Simmons-Harris*, 234 F.3d at 959 (Pet. App. at 25a-26a), citing Martha Minnow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999). Indeed, the Sixth Circuit dismissed other educational options available to Cleveland parents as irrelevant. Taking a rigidly formalistic view, the court below emphasized that the scholarship program and another Cleveland educational alternative, the Community School program, are codified in separate chapters of the Ohio Revised Code. *Simmons-Harris*, 234 F.3d at 958 (Pet. App. at 23a-24a). It then held that this fact alone demands that the scholarship program's sectarian "effects" be viewed in

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student they admitted. *Simmons-Harris*, 234 F.3d at 959 (Pet. App. at 26a). In fact, any adjacent public school districts would receive an *additional* $2,250 in state funding, because scholarship students would be included in each suburban school district's total number of students (the "average daily membership," or "ADM") for purposes of calculating the amount of state funds the district receives. *See* R.C. 3317.03(I)(1), 3327.061 and 3317.08(A)(1). For instance, if a suburban public school district had chosen to participate in the Program during 2000-01, it would have received as much as $6,544 for each scholarship student it enrolled ($2,250 from the scholarship itself, in addition to the $4,294 amount from the ADM formula). *See* R.C. 3317.02(B), (N).

isolation from the incentives and choices made available by this 42-strong network of Cleveland community schools.

Unlike the Sixth Circuit, the Wisconsin court was deeply contextual in its approach, examining the Milwaukee scholarship program in light of other educational options available to Milwaukee's children. These options included, in addition to schools participating in the Scholarship Program, neighborhood public schools, other general public schools within the district, and specialized public schools. Only after reviewing these available options did the Wisconsin court conclude the Milwaukee program was not "skewed toward religion." *Jackson*, 578 N.W.2d at 618. Examined in its surrounding context, the Milwaukee program merely added religious schools to a pre-existing range of options for eligible children. This "seminal fact" took the Milwaukee program "out of the *Nyquist* construct" and "place[d] it within the framework of neutral education assistance programs." *Id.* at 614, n. 9. In contrast, the Sixth Circuit invalidated the Ohio program largely because that court focused not on the children receiving benefits, but on the private schools participating in the program. "We conclude that unlike *Mitchell*, *Agostini*, *Witters* and *Mueller*, the Ohio Scholarship Program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria." *Simmons-Harris*, 234 F.3d at 961 (Pet. App. at 29a).

These differences between the two decisions point not only to a stark conflict, but even more importantly to the lingering confusion over this Court's elaborate body of Establishment Clause precedents. This conflict not only clouds the school reform debate in Wisconsin and Ohio, it promises to affect the development of education reforms nationwide.

III. The Sixth Circuit's Decision Conflicts With This Court's Decisions.

In condemning the Cleveland Scholarship Program as violative of the Establishment Clause, the Sixth Circuit all but ignored two key, uncontested facts about the Program: (1) it is neutral on its face, giving no preference to religious schools over secular schools; and (2) no money flows to religious schools unless the parent of a scholarship student makes an independent choice to send her child to such a school. In brushing aside these factors, the Court failed to take into account the considerable post-*Nyquist* developments in this Court's Establishment Clause jurisprudence. The resulting decision—in particular its extreme reading of *Nyquist*—cannot be squared with this Court's recent pronouncements.

Since its earliest decisions applying the Establishment Clause to the States, this Court's religion cases have stressed the pivotal importance of neutrality. Neutrality has thus played an important role in almost every effort to interpret the Establishment Clause or to reconcile it with the Free Exercise Clause. *See, e.g., Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). In *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995), the Court noted that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Again in *Agostini v. Felton*, 521 U.S. 203, 231 (1997), the Court emphasized that a program's criteria do not create financial incentive to undertake religious education where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." And *Mitchell v. Helms*, 530 U.S. 793, 830 (2000) (plurality), observes that the Court has

"consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."

To that end, a government may not gerrymander the contours of a program in order to benefit or disfavor particular religions. *See, e.g., Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 690 (1994). But there is no suggestion that Ohio has done so here. To the contrary, the Ohio program provides eligible parents with a neutral, secular benefit—funds enabling them to select the best possible educational opportunities for their children. This case is therefore *not* one where the nature of the benefits themselves—like creationism reading materials or Ten Commandments wall placards—are imbued with overtones of sectarianism. *Cf. Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down statute prohibiting the teaching of evolution theory); *Stone v. Graham*, 449 U.S. 39 (1980) (striking down statute requiring posting of Ten Commandments in public schools).

Having chosen to provide facially non-religious benefits, the Ohio program distributes them neutrally to students within "any school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent," R.C. 3313.975(A), and especially to low-income students. Although Cleveland, where religious schools are predominant, is currently the only district falling into that category, it is possible that other school districts, including districts with different religious demographics, could be included in the Scholarship Program in the future. *See Simmons-Harris v. Goff*, 711 N.E.2d at 213-14.

This latter point is fundamental because Cleveland's longstanding preponderance of religiously-affiliated private

schools serving low- and moderate-income students did not arise as a result of any government action, much less the Scholarship Program. It would be incongruous—and unconstitutional under the Establishment Clause—to strike down a scholarship program in Cleveland while permitting an identical program in another community, with equally troubled schools, where secular schools happened to control a larger share of the market. Because "[t]he Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools," *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring), the "proper" principle for Establishment Clause jurisprudence is "government impartiality, not animosity, toward religion." *Id.* at 717-18. That impartiality is manifest here.

A further hallmark of this Court's governing Establishment Clause precedents is emphasis on private choice. The Court's decisions therefore distinguish between programs that provide direct governmental funding to religious organizations and those in which governmental assistance flows to religious institutions only indirectly and as a result of decisions made by individual aid recipients. Just last Term, in *Mitchell v. Helms*, both the plurality opinion and the concurring opinion stressed the importance of independent choice. Both opinions noted that governmental aid is permissible when, as the concurrence puts it, "the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use." *Mitchell*, 530 U.S. at 841 (O'Connor, J., joined by Breyer, J., concurring), citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 488 (1986), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 10 (1993). In these circumstances, "[a]ny aid. . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Mitchell*, 530 U.S. at 841 (O'Connor, J., joined by Breyer, J., concurring) (internal citations omitted). *See, also, Mueller v. Allen*, 463 U.S. 388, 399 (1983) (distinguishing between private choice programs and direct aid programs).

True private choice programs, by their very nature, cannot have the forbidden "primary effect" of the government "advancing religion." That is because, when students or parents decide where aid will be applied, any religious "advancement" that occurs is attributable to private choices, not governmental action. "The fact that aid flows to the religious school and is used for the advancement of religion is therefore wholly dependent on the student's private decision." *Mitchell*, 530 U.S. at 842 (O'Connor, J., joined by Breyer, J., concurring). Accordingly, this Court's decisions hold, contrary to the Sixth Circuit, that when individuals determine whether and how much money flows to religious institutions, it is no more troubling than when a government employee donates her paycheck (all derived from public funds) to a church. *Witters*, 474 U.S. at 486-88; accord *Rosenberger*, 515 U.S. at 880 (Souter, J., dissenting).

To be sure, the individuals' private choices must be truly independent to pass constitutional muster. This Court has made clear that the First Amendment does not tolerate government coercion of religious beliefs or practices or the imposition of the majority's viewpoint through social or financial pressures, however subtle. *See, e.g., Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 310-12 (2000); *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Here, however, there can be no realistic contention that Ohio is fostering subtle social coercion of parents to withdraw from public schools and enroll their children in private, sectarian schools. Ohio law offers parents a range of educational options: attending a public school in Cleveland, with or without tutoring assistance; attending a private school in Cleveland, with a scholarship for tuition; attending a community school in

Cleveland; or attending a participating public school outside the Cleveland School District. *See Simmons-Harris* at 964-65 (Pet. App. at 37a-38a) (Ryan, J., dissenting). The parental decision as to which of these options to choose—far from being subject to subtle coercion favoring religion—is made in private, with enrollment in the secular, Cleveland public schools the default option. *Cf. Santa Fe*, 530 U.S. at 312 (pre-game prayer had improper effect of coercing those present to participate in an act of worship); *Lee*, 505 U.S. at 593 (clergy-led invocation had coercive and intrusive effect).

Likewise, the Program also "creates no *financial* incentive for parents to choose a sectarian school," *Zobrest*, 509 U.S. at 10 (emphasis added), and so parents remain free to choose, without any skewing of their decision, the best educational option for their child. The court below counted the Program's comparatively low per-pupil expenditure as a factor undermining its constitutionality. But it might more rationally have concluded the opposite: that the Program can in no way be deemed to favor sectarian schools because it permits students to choose sectarian schools *only* if they are willing to shoulder a significant $250 annual co-payment (not required of public school students) and *only* if they are willing to forego the much higher State-aid levels that would follow them to a school chosen from one of the three categories of necessarily secular schools—a Cleveland public school ($7,097 in State aid versus the $2,250 scholarship), a suburban public school (a maximum of $6,544 in State aid versus the $2,250 scholarship), or a Cleveland community school ($4,518.79 in State aid). *See Simmons-Harris*, 234 F.3d at 959 (Pet. App. at 26a); R.C. 3317.02(B), (N); Affidavit of Steven Puckett ¶ 14 (R. 96 at 1017, C.A. App. at 1615).

Where, as here, no social coercion or financial incentives are brought to bear on behalf of religion, this Court has specifically rejected the conclusion reached below—that an educational program does not offer "real choice" if a high percentage of participating schools are religious. In *Mueller*, for example, the Court held that it was not constitutionally relevant that the overwhelming majority of the tax deductions ("96%") were for the expenses of parents who sent their children to religious schools. *Mueller*, 463 U.S. at 401. *Mueller* emphasized that it is the *ex ante* neutrality of a program that matters, not the statistician's tally of *ex post* results aggregated over thousands of independent parental decisions:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

Id.

Similarly, in *Agostini v. Felton*, more than 90% of the private schools participating in the program were religious. *Agostini*, 521 U.S. at 210. Even so, this Court reaffirmed the principle that a neutral program will not be invalidated solely on the basis of statistics concerning the number of students using aid in parochial settings. *Id.* at 229-30.

The Sixth Circuit majority nevertheless held the precise opposite, relying almost exclusively on *Nyquist*. *See Simmons-Harris*, 234 F.3d at 958 (Pet. App. at 24a-25a). *Nyquist* found the Establishment Clause neutrality requirement violated by a New York City tuition-reimbursement program that was designed exclusively to benefit the parents of private (as opposed to public) schoolchildren in a geographic area that was not identified on a basis of educational need. *Nyquist*, 413 U.S. at 782-83 & n. 38. But, although the Sixth Circuit gave inadequate weight to it, *Nyquist* carefully reserved decision on "a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist*, 413 U.S. at 782, n. 38.

In conspicuous contrast to *Nyquist*, the Ohio program extends as many tutorial assistance grants to public school students as it does scholarships to private school students, permits all suburban Cleveland public schools to participate, is open to *any* Ohio district that meets neutral criteria of educational and management failure, and is focused on the needs of low-income students. The Cleveland initiative is therefore precisely the type of public *and* private "scholarship" program on which *Nyquist* carefully reserved judgment.

Because the Ohio program is vastly different from the New York program considered in *Nyquist*, the Court need not decide in this case whether *Nyquist* remains good law. Nevertheless, even a cursory review of the Court's recent Establishment Clause precedents attests that *Nyquist*'s analysis has not withstood the test of time. As this Court emphasized in *Agostini*, the "general principles" the Court uses "to evaluate whether government aid violates the Establishment Clause have not changed" in recent years.

Agostini, 521 U.S. at 222. The Court continues to ask, as it always has, "whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged." *Id.* at 222-23. What *has* changed is the Court's articulation of "the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223. As *Agostini* and *Mitchell* illustrate, those criteria have recently come into much sharper focus. In particular, where, as here, (1) a non-religious category of benefit is (2) conferred on a neutrally defined class (3) in circumstances of true private choice, the Court has uniformly held that no Establishment Clause violation exists.

We acknowledge, of course, that no lower court, including the Sixth Circuit, should conclude that the Court's "more recent cases have, by implication, overruled an earlier precedent." *Agostini*, 521 U.S. at 237. In the final analysis, it is precisely this exclusive authority to overrule this Court's decisions that brings the State of Ohio and its senior education officials to the Court today. Educators nationwide now confront paralyzing judicial confusion, rooted ultimately in *Nyquist*, over the question of how recent Establishment Clause jurisprudence applies to neutral, indirect programs of non-religious aid that benefit religious schools solely as a result of independent choice. Only this Court can answer that question.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

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